

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

E-FILED - 3/19/07

UNITED STATES OF AMERICA,

NO. CR-04-20123-RMW

Plaintiff,

ORDER ON MOTION FOR BAIL PENDING APPEAL

V.

JON PERROTTON,

Defendant.

18 Defendant Jon Perroton moves for bail pending appeal. He claims that the court's
19 calculation of loss was erroneous. The critical question raised by the motion is whether
20 Perroton has raised a substantial question of law or fact that is likely to result in a reduced
21 sentence with a term of imprisonment less than the total time already served plus the
22 expected duration of the appeal process. See 18 U.S.C. § 3143(b).

23 The court finds that the issue of how the loss should have been calculated is a fairly
24 debatable one. See *United States v. Handy*, 761 F. 2d 1279, 1283 (9th Cir. 1985). The
25 more difficult question is whether the court would have imposed a sentence lower than it
26 did if it adopted the defendant's proffered loss figure. Although the court considered the
27 sentencing range resulting from its Guideline calculation as a factor in determining
28 Perroton's sentence, it was only one of the factors considered under 18 U.S.C. § 3553(a).

1 If the court had adopted defendant's proffered loss amount, the total offense level would
2 have been 9 rather than 10. Since defendant's criminal history level is IV, the Guideline
3 imprisonment range would have been 12-18 months if defendant's calculation had been
4 used as opposed to the 15-21 months considered by the court. Under the non-binding plea
5 agreement between the parties, the government agreed to recommend that the defendant
6 "be sentenced at the low end of the applicable Sentencing Guidelines range provided that
7 the total offense level as calculated by the Court [was] ten or higher" Plea Agreement
8 ¶ 16d. The United States Attorney remained free to "recommend any conditions of
9 confinement, including imprisonment, if the total offense level [fell] within Zone B or C of the
10 sentencing table." *Id.*

11 Although the court found fifteen months of confinement reasonable considering all
12 the factors under § 3553, it would nevertheless have considered a sentence of
13 imprisonment at the low end of the Guideline range if it had adopted defendant's loss
14 calculation. Therefore, a likelihood exists that if the court's loss calculation is erroneous,
15 the result will be that defendant will eventually receive a sentence with a term of
16 imprisonment that will be less than what he has already served plus the length of the
17 appellate process.

18 Defendant is granted bail pending appeal on the same conditions now existing.
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20 DATED: 3/16/07

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23 RONALD M. WHYTE
United States District Judge
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2 Copy of Order Mailed/E-Filed to Counsel of Record:

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